GHARBI v. GIBRALTAR JOINERY AND BUILDING SERVICES LIMITED

SUPREME COURT (Schofield, C.J.): October 10th, 1997

Limitation of Actions—tort actions—running of time—under Limitation Ordinance, ss. 5 and 10(4), time runs from discovery of material and decisive fact which would lead reasonable man to seek legal advice—subjective ignorance of legal rights irrelevant if cause and extent of personal injury known from outset

The plaintiff brought proceedings against his employer for damages for breach of statutory duty and negligence.

The plaintiff was employed as a carpenter by the defendant company. In 1992, in the course of his work, he sustained a penetrative injury to his left eye and lost most of his sight in that eye. He underwent two operations during which surgeons attempted to save the eye but the decision was taken in 1994 to remove it and replace it with an implant. He resigned shortly before the final operation, for reasons which the parties disputed. The plaintiff was a Moroccan immigrant, was illiterate and had difficulty understanding English. He was assisted by his trade union regarding the termination of his employment.

Six months after the removal of his eye, on the advice of the hospital treating him, the plaintiff sought legal advice as to the possibility of obtaining compensation for his injury. An application for legal assistance was made in 1995 and was refused. By the time the plaintiff had appealed against the refusal in 1996, the statutory limitation period of three years for the plaintiff's action had expired. He was granted leave under s.5 of the Limitation Ordinance to commence proceedings outside the limitation period, but the defendant applied for the question of limitation to be heard as a preliminary issue.

It submitted that (a) the plaintiff should not be permitted under s.5 to pursue his action, since he had been in possession of the material facts relating to his causes of action, namely, the cause and extent of his injury and the availability of legal advice, more than three years in advance of commencing proceedings; and (b) those facts were of a "decisive character" within the meaning of s.10(4), so that a reasonable man such as the plaintiff who was aware of them should have commenced proceedings within the limitation period.

The plaintiff submitted in reply that (a) since he had been unaware that he could obtain compensation for his injury until two and a half years after it had occurred, and since this was a material and decisive fact relating to his cause of action, the court should regard time as having run

from the date that he received legal advice; and furthermore (b) proceedings might have been commenced within the limitation period had it not been for the delay in obtaining legal assistance for which he was not to blame.

Held, dismissing the plaintiff's action:

The plaintiff had satisfied the court that he had *prima facie* causes of action for breach of statutory duty and negligence. However, he had not met the further requirement of leave to proceed under s.5 of the Limitation Ordinance, since he had failed to show that he had been unaware of having a worthwhile cause of action until within three years before commencing proceedings. For the purposes of s.10(4) of the Ordinance, the traumatic injury sustained by the plaintiff (and not the removal of his eye or the loss of his employment) was a material fact of a "decisive character" relating to his causes of action, since it had immediate consequences of which he was aware from the start and which should have led him to seek legal advice. As a reasonable man, who had taken trade union advice, the plaintiff, despite his language difficulties, could be expected to have acted with more expedition than he did. Accordingly, his action was time-barred and would be dismissed (page 188, line 12 – page 189, line 10).

Cases cited:

(1) *Goodchild* v. *Greatness Timber Co. Ltd.*, [1968] 2 Q.B. 372; [1968] 2 All E.R. 255, *dicta* of Denning, M.R. applied.

(2) *Harper* v. *National Coal Bd.*, [1974] Q.B. 614; [1974] 2 All E.R. 441.

(3) *Howell* v. *West Midlands Passenger Transp. Exec.*, [1973] 1 Lloyd's Rep. 199.

(4) *Smith* v. *Central Asbestos Co. Ltd.*, [1972] 1 Q.B. 244; [1971] 3 All E.R. 204; on appeal, *sub nom. Central Asbestos Co. Ltd.* v. *Dodd*, [1973] A.C. 518; [1972] 2 All E.R. 1135, *dicta* of Denning, M.R. applied.

Legislation construed:

Limitation Ordinance (1984 Edition), s.4(1):

> "The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say:—
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> (*a*) actions founded on simple contract or on tort;
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> . . .
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> Provided that, in the case of actions for damages for negligence, nuisance or breach of duty . . . where the damages . . . consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

s.5(1): The relevant terms of this sub-section are set out at page 186, lines 19–26.

s.5(3): The relevant terms of this sub-section are set out at page 186, lines 27–32.
s.10(4): The relevant terms of this sub-section are set out at page 186, lines 35–45.

D. Whitmore for the plaintiff;
F.R. Picardo for the defendant.

SCHOFIELD, C.J.: In this action counsel have agreed that a preliminary issue, that of limitation, should be taken. Abderrahman Gharbi was employed by the defendant, Gibraltar Joinery and Building Services Ltd., as a carpenter and had been working for them since November 4th, 1989. Mr. Gharbi is a Moroccan national and held the necessary permit to work in Gibraltar. On November 19th, 1992 he was working for the defendant at its site in the offices of the Environmental Agency in Town Range, when he dislodged a nail from a piece of wood—he says by tugging at a piece of string to which the nail was attached. The nail flew into his left eye with tragic results. Mr. Gharbi lost the sight in his eye. He underwent three operations on the eye at Moorfields Eye Hospital in London. The first was an exploratory operation conducted a week after the accident and a second, to remove silicone from the eye, was conducted in February 1994. In a report of May 31st, 1994, Mr. Cooling, a Consultant Ophthalmic Surgeon, summarized Mr. Gharbi's position thus:

> "Mr. Gharbi sustained a blinding penetrating injury of the left eye compatible with the circumstances as described. The residual vision in the left eye is clearly interfering with that of the right and causing him continuing difficulties which are not be expected to resolve themselves with time. The left eye is uncomfortable and the question has been raised as to whether the eye should be removed to eliminate his residual symptoms. From the appearance of the left eye when I last examined him, I would regard the left eye as being cosmetically disfigured and this should be taken into consideration in his claim for disability allowance."

Mr. Gharbi underwent a third operation for the removal of his left eye on December 3rd, 1994 and the eye was replaced by a scleral ball implant.

The defendant had retained Mr. Gharbi in its employment and indeed, on July 12th, 1994, applied for a renewal of his work-permit. Be that as it may, Mr. Gharbi terminated his employment with the defendant on November 4th, 1994. He says his services were terminated because he could no longer work as a carpenter. Not so, says the defendant, which claims it wished to retain Mr. Gharbi's services on the same pay but performing lighter duties. He was prepared to resign to enable him to claim unemployment benefit and his employment was thus terminated on medical grounds.

The accident which caused the loss of Mr. Gharbi's eye occurred on November 19th, 1992. It was not until mid-June 1995 that Mr. Gharbi went to Messrs. Marrache & Co. for advice, immediately after which a legal aid application was made. This application was rejected and an appeal was lodged against the Registrar's decision. On November 13th, 1996, an application was lodged for leave pursuant to s.5 of the Limitation Ordinance. Leave was considered necessary because the accident resulting in the injury occurred more than three years before the filing of the action and Mr. Gharbi wishes to claim damages against his former employer for breach of statutory duty and for negligence. The application was granted by Pizzarello, A.J. on December 18th, 1996. That decision does not prevent the defendant from arguing that the action is time-barred at the hearing of the suit. That is what it now does.

Section 4 of the Limitation Ordinance provides a three-year limitation period from the date on which the cause of action accrued in the case of actions such as Mr. Gharbi's for damages for breach of statutory duty and for negligence. However, by s.5 the three-year period may be extended in the following circumstances:

> "(1) Section 4(1) (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—
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> (*a*) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
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> (*b*) the requirements of subsection (3) of this section are fulfilled.
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> . . . .
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> (3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which was not earlier than three years before the date on which the action was brought."

Section 10(4) of the Ordinance is intended to help us in our interpretation of s.5. It says:

> "For the purposes of sections 5 to 9 any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from any defence under section 4(1) or so much of section 7 of the Contract and Tort Ordinance as requires actions under Part IV thereof to be commenced within three years after the death of the deceased) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action."

These provisions are in exactly the same terms as the similar provisions of the English Limitation Act 1963. They were amended in 1975, so we derive most assistance from the English authorities between 1963 and 1975 and, indeed, I derive great assistance from the passage from the judgment of Lord Denning, M.R. in *Goodchild* v. *Greatness Timber Co. Ltd.* (1) ([1968] 2 Q.B. at 379):

> "We have had to consider the Limitation Act, 1963, on several occasions. It is very difficult to understand. The particular section here in question is section 7(4) which defines what facts are of a 'decisive character.' I can best explain it by stating the way it should be applied. Take all the facts known to the plaintiff, or which he ought reasonably to have ascertained, within the first three years, about the accident and his injuries. Assume that he was a reasonable man and took such advice as he ought reasonably to have taken within those three years. If such a reasonable man in his place, so advised, would have thought he had a reasonable prospect of winning an action, and that the damages recoverable would be sufficiently high to justify the bringing of an action—in short, if he had a 'worth-while action'—then he ought to have brought the action within the first three years. If he failed to bring an action within those three years, he is barred by the statute. His time will not be extended under the Limitation Act, 1963, simply because he finds out more about the accident or because his injuries turn out to be worse than he thought. His time will only be extended if a reasonable man in his place would not have realised, within the first two or three years, that he had a 'worth-while action.' And then, if it should turn out after the first two or three years that he finds out facts which make it worth while to bring an action, he must start it within twelve months after he finds out those facts. Then, and then only, will the time limit be extended so that he is not barred."

As I understood it, Mr. Gharbi's counsel abandoned an initial argument that his cause of action arose when his loss was suffered, that is either when his contract of employment was terminated on November 4th, 1994 or on the date when his eye was removed, on December 3rd, 1994. This argument had no merit and was acknowledged to have no merit. Mr. Gharbi suffered a traumatic injury on November 19th, 1992 which led to immediate blindness in his left eye. On his own contention the cause of action for breach of statutory duty and negligence arose on November 19th, 1992. Nor was it argued that the termination of his employment or the removal of the eye constituted material facts of a decisive character relating to the cause of action so as to bring Mr. Gharbi within the provisions of s.5 of the Limitation Ordinance on those grounds. It cannot be right that the termination of his employment was a decisive fact in the presentation of this action. Nor can it be right that Mr. Gharbi did not appreciate that he had a very serious eye injury until his eye was removed.

What brings Mr. Gharbi within s.5, says his counsel, is that he was not aware that he could sue his employers until he consulted Messrs. Marrache & Co. in mid-June 1995. Any delay which has occurred since then is largely due to the delay in processing his legal aid application. It is averred that Mr. Gharbi is illiterate and finds it very difficult to follow English. He was assisted by his trade union in 1994 but it was only when a hospital official told him on May 31st, 1995, on a visit to Moorfields Eye Hospital, that he should ask for a lawyer, that he thought to seek legal advice. He then went to Messrs. Marrache & Co. and advice was interpreted for him into his own language. Mr. Gharbi then realized that he could and should bring a claim against his employer.

In order to get leave for the purposes of s.5 of the Limitation Ordinance an applicant must (a) show a *prima facie* case that he would have a cause of action for breach of duty or negligence and also (b) satisfy the requirement that he did not know that he had a worthwhile cause of action until within the last three years. His knowledge can be actual or constructive (see s.5(3)).

Lord Denning, M.R. said this in *Smith* v. *Central Asbestos Co. Ltd.* (4) ([1972] 1 Q.B. at 258):

> "A man is taken to have constructive knowledge as soon as he could reasonably be expected to put the facts before a legal adviser and be advised that he had a worthwhile cause of action. From that moment time runs against him. But if he is put off by some circumstance which afford him a reasonable excuse—so that he could not reasonably be expected to go to a legal adviser—then his time will be extended until his misapprehension is removed."

Lord Denning repeated those words in *Howell* v. *West Midlands Passenger Transp. Exec.* (3) ([1973] 1 Lloyd's Rep. at 201) and in *Harper* v. *National Coal Bd.* (2) ([1974] 2 All E.R. at 447). It is noteworthy that *Smith* and indeed most of the English authorities on this point are cases where the applicant suffered from an insidious disease and did not suffer a traumatic injury.

One must accept the evidence tendered on behalf of Mr. Gharbi that he did not actually know he had a cause of action against his employer until he took legal advice in June 1995. However, he did have knowledge of all other material facts well before June 1995, indeed from the time of the injury. This was a traumatic injury, the seriousness of which must have been apparent to Mr. Gharbi from a very early stage. He was sufficiently aware that avenues existed through which he could pursue his rights to take trade union advice. There is some dispute over whether he was ever advised by his union that he should seek legal advice and, as I say, for the purpose of this hearing I am prepared to accept he did not know he had a cause of action until he attended the offices of Messrs. Marrache & Co. There is no evidence, however, as there is in some of the English cases, that he was told by his employer or any official that he could not pursue

his employer. He may not have a grasp of English but that did not affect his knowledge of the facts which would lead him to a legal adviser and once he went to a legal adviser his language difficulties were overcome. No circumstance intervened which kept Mr. Gharbi away from a legal adviser and in all the circumstances, in my judgment, he could reasonably have been expected to put the facts before a legal adviser very soon after the accident. He would then have been advised that he had a worthwhile cause of action.

I therefore hold that the action is time-barred and it is dismissed with costs.

Suit dismissed.